

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98/
Provisions of the Telecommunications)	
Act of 1996)	
)	
Applications for Consent to the Transfer)	CC Docket No. 98-141
of Control of Licenses and Section 214)	
Authorizations from Ameritech Corporation,)	
Transferor to SBC Communications Inc.,)	
Transferee)	
)	
Common Carrier Bureau and Office of Engineering)	NSD-L-00-48
and Technology Announce Public Forum on)	DA 00-891
Competitive Access to Next-Generation)	
Remote Terminals)	

**COMMENTS OF
FOCAL COMMUNICATIONS CORPORATION**

Focal Communications Corporation ("Focal") submits these comments in support of the Petition for Declaratory Ruling ("Petition") submitted by the Association for Local Telecommunications Services ("ALTS") pursuant to the Public Notice released by the Federal Communications Commission ("Commission") on May 24, 2000.¹ The issues raised by ALTS in the Petition are among the most important presently faced by the industry. Focal fully supports ALTS's request that the Commission issue a declaratory ruling to address them.² In these initial

¹ *Pleading Cycle Established for Comments on ALTS Petition for Declaratory Ruling: Loop Provisioning*, Docket Nos. 98-147, 96-98, 98-141, NSD-L-00-48, Public Notice, DA 00-1141 (rel. May 24, 2000).

² To the extent necessary, Focal would support the opening of a proceeding to deal with the issues raised in the Petition.

Comments Focal will concentrate on the issues related to the provisioning of special access services. Focal reserves the right to address the other issues in reply comments.

Focal is a facilities-based provider of data and voice communications services, serving primarily traffic-intensive users of local services, value-added resellers, and Internet service providers in major markets nationwide. In order to provide these services, Focal must obtain high-capacity facilities between its customers' premises and its own network. Focal uses a variety of methods to establish these high-capacity connections. These methods include ordering unbundled network elements ("UNEs") from incumbent local exchange carriers ("ILECs"), building its own dedicated facilities, and ordering high-capacity services from ILECs off of special access service tariffs. Of these options, it is Focal's preference to self-provision or order high-capacity circuits as UNEs. However, as discussed below, there are many instances in which these options are simply unavailable. In these circumstances Focal has no other viable alternative but to rely upon special access services to meet its needs for high-capacity facilities.

I. Special Access Services Offer An Important Mode Of Competitive Entry

Despite the significant advances made in opening the local telecommunications market to competition since the passage of the Telecommunications Act of 1996 ("1996 Act" or "Act"),³ special access services remain an important vehicle for competitive entry, not only in the interexchange market, but also in the market for high-capacity advanced services.⁴ The Commission has long recognized that special access services play an important role in promoting competition in the telecommunications market and ensuring that consumers obtain the full

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et. Seq.* ("1996 Act").

⁴ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Doc. No. 96-98, Supplemental Order Clarification, FCC 99-370 at ¶ 18 (rel. June 2, 2000) ("*Supplemental Order Clarification*").

benefits of technological advances in the industry.⁵ The Commission has also recognized that providing greater, not fewer, options for procuring loops will facilitate entry by competitors and that Congress intended for competitors to have multiple options available.⁶

Focal joins with ALTS in urging the Commission to take the necessary steps to preserve special access as a viable alternative for competitive providers by improving the provisioning and quality of the services delivered. These facilities are often the only viable choices available to CLECs that need access to high-capacity facilities for the provision of advanced services. For example, there are many instances in which Focal would not be permitted, under the Commission's current rules, to obtain the UNE combination equivalent of special access that it requires.⁷ Also, Focal has numerous existing special access connections that require continuing maintenance and repair on a going-forward basis.

With regard to self-provisioning, Focal emphasizes that in the *EEL Order* requiring access to high-capacity loops, the Commission found that self-provisioning of high capacity loop facilities is not a viable competitive alternative due to the expense and time necessary for construction.⁸ Similarly, the recent availability of high capacity loops as UNEs has not lessened the need for special access services. High-capacity UNEs have only recently been mandated by the Commission and many CLECs, including Focal, are experiencing considerable difficulties in obtaining timely provisioning and maintenance of the high-capacity loop UNEs they order from

⁵ *Expanded Interconnection With Local Telephone Company Facilities*, CC Doc. No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd. 7369 at ¶¶ 2-3 (1992) ("*Special Access Order*") (stating that special access will benefit competition by expanding service choices, heighten incentives for efficiency, speed technological innovation and increase pressures for cost based prices).

⁶ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Doc. No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 at ¶ 200 (1999) ("*UNE Remand Order*").

⁷ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Doc. 96-98, Supplemental Order Clarification, FCC 99-370 at ¶ 18 (rel. June 2, 2000) ("*EEL Order*") (extending prohibition on conversion of special access to enhanced extended links unless the carrier provides a significant amount of local exchange service over the elements). While Focal does not entirely agree with this ruling, it represents the current state of the law and renders Focal's reliance upon special access all the more important.

the ILECs.⁹ This uncertainty as to provisioning and quality of high-capacity UNEs renders them undesirable for use with Focal's customers given the damage poor service quality can do to Focal's brand. Accordingly, Focal and other CLECs require tariffed special access services in order to provide competitive local services and remain competitive.

II. ILEC Provisioning Of Special Access Services Is Poor

As discussed, special access services remain a crucial mode of competitive entry for CLECs that require access to high-capacity facilities. However, it is Focal's experience that ILECs' provisioning and maintenance of these services are poor. In certain locations, Focal's customers repeatedly experience significant delays in ILEC provisioning of special access services. These delays damage Focal's reputation for quality and make it increasingly difficult to maintain positive relations with clients.

The most obvious problem that Focal has experienced is that the firm order commitment ("FOC") dates provided by ILECs for special access facilities are essentially meaningless. The dates are routinely changed at the last minute, or simply missed without explanation. Similarly, customer not ready ("CNR") reports are provided without explanation and without providing Focal an opportunity to correct any problems at the customer site. Nor are jeopardy notices provided in response to any circumstance that might delay the provisioning of special access services. Frequently, the ILEC personnel are simply waiting outside for someone to let them

⁸ UNE Remand Order at ¶ 182.

⁹ UNE Remand Order at ¶ 181 (mandating the unbundling of high capacity loop facilities); see Letter from William D. Smith, Counsel, *Bell Atlantic*, to the honorable Debra Renner, Acting Secretary, *New York Public Service Commission*, Re: Case 97-C-0271 and 99-C-0949 - Performance Assurance Plan - March 2000 Monthly Report and Final January 2000 Monthly Report (April 25, 2000) ("*PAP March Report*") (transmitting Bell Atlantic's Monthly Performance Report required in compliance with its Section 271 obligations to the New York Public Service Commission) (indicating that Bell Atlantic was liable for \$907,895 in payments for failing to meet its UNE provisioning requirements); see also *Bell Atlantic Performance Monitoring Reports, 28 Months (9/97 through 12/99) for 14 States*, available at: http://www.fcc.gov/ccb/asd/BA_NYNEX/perfmon.html (performance filings made pursuant *NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985 (1997)) ("*BA-NYNEX Merger Order*").

into the customers' premises and rather than call Focal or its customer, the ILEC personnel simply leave without completing the work. These difficulties are not unique to special access services. Indeed, the issues of missed FOC dates, frequent CNRs and the development of jeopardy notice procedures are well known as they relate to UNE loop provisioning.

Focal urges the Commission to address these provisioning issues for special access services. At the time the Commission created the current rules governing special access services it recognized that the ILECs had both the ability and incentive to undermine the effectiveness of this service and thereby thwart competition.¹⁰ At that time, the Commission focused upon ensuring that ILECs did not undermine the usefulness of special access services by employing unfair pricing practices.¹¹ The provisioning problems faced by CLECs that order special access services are no less of a threat to the viability of the service than were the pricing issues previously dealt with by the Commission. The fact is, that instead of undermining the use of special access through monopoly pricing, ILECs are now having some success in undermining it through poor provisioning. Moreover, Focal believes that the ILECs discriminate against their competitors *vis à vis* their own retail customers, whether the competition is receiving UNEs or special access. These problems must be addressed if robust and lasting competition is to take hold in the various telecommunications markets.

¹⁰ 47 C.F.R. §§ 69.114, 69.115; *see Special Access Order* at ¶ 164 *et. seq.*
¹¹ *See Special Access Order* at ¶ 172 *et. seq.*

III. The Commission Must Adopt Standards And Incentives To Improve The Provisioning And Maintenance Of Special Access Services

Focal agrees with ALTS that the best way to address special access provisioning problems is to implement a system of performance measures, reporting, and incentives to ensure compliance. The Commission and several states have already implemented such performance measure systems for application to UNE provisioning in conjunction with ILEC mergers and Section 271 applications.¹² Unfortunately, none of these existing performance measure regimes squarely addresses provisioning problems with special access services. Focal urges the Commission, pursuant to its authority under Sections 201 - 205 of the Act,¹³ to establish performance standards governing the provision of special access services.

A. Requested Standards

Focal believes that in order for a remedy to have a meaningful effect, the Commission must adopt national minimum provisioning standards on a pre-emptive basis, even if the jurisdictionally interstate services are ordered off a state tariff.¹⁴ Focal believes that the performance standards and penalties contained in the Performance Assurance Plan ("PAP") currently in place in New York that apply to UNEs should be used as a model for federal standards applicable to special access services.¹⁵ The New York Public Service Commission

¹² See *BA-NYNEX Merger Order* at Appendix C; see *Application by Bell Atlantic New York for Authority Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Doc. No. 99-295, FCC 99-404, ¶ 431 *et. seq.* (1999) ("*BA-NY 271 Order*").

¹³ 47 U.S.C. §§ 201, 202. The current regulations relating to special access were implemented, in part, under Sections 201 - 205 of the Act. *Special Access Order* at ¶ 219. In the alternative and at a minimum, Focal believes the Commission should find that Section 251(c)(1) good faith negotiation obligations apply to all metrics and standards involving high-capacity loop facilities, including those acquired via tariff. 47 U.S.C. § 251(c)(1).

¹⁴ The Commission has ruled that ISP-bound traffic is jurisdictionally interstate in nature. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Doc. Nos. 96-98, 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38 at ¶¶ 18-19 (1999) ("*Recip. Comp. Order*"). While Focal does not agree with this conclusion, it is, nevertheless, the current state of the law.

¹⁵ See Letter from William D. Smith, Counsel, *Bell Atlantic*, to the honorable Debra Renner, Acting Secretary, *New York Public Service Commission*, Re: Case 97-C-0139, Compliance Filing, intercarrier Service Quality Guidelines (February 29, 2000) ("*Service Quality Guidelines*") (transmitting Service Quality Guidelines to the New York Public Service Commission), located at: <http://www.dps.state.ny.us/38757.pdf>.

adopted these standards in its Order approving Bell Atlantic's Section 271 application. The Commission has already found that the PAP is a reasonable mechanism for use in determining whether ILECs are discriminating against competitors in the provisioning of services.¹⁶

Furthermore, these standards have been carefully crafted to take into account the many operational and technical circumstances that both CLECs and ILECs face in coordinating the provisioning of UNEs. Given that special access facilities are virtually identical to the UNEs covered by the Performance Assurance Plan,¹⁷ Focal believes that these standards could be applied to special access services with little difficulty. The PAP contains standards and benchmarks for each item in the provisioning process, from pre-ordering, to ordering, provisioning, maintenance and repair, and billing.¹⁸ Where the standards are not met, the ILEC is subject to either market adjustments paid to the CLEC that received the sub-standard performance, or to assessment paid to the Commission.¹⁹

B. Enforcement

Focal agrees with ALTS that the Commission must adopt a federal enforcement mechanism to ensure that ILECs comply with any provisioning rules.²⁰ ALTS suggests self-executing monetary penalties and *prima facie* penalties that would apply by means of a rebuttable presumption in subsequent enforcement or remedial proceedings.²¹ These could form the basis for acceptable penalties. Focal proposes that the self-executing penalties be tied directly to the performance measures in the same manner as the penalties contained in the PAP. This would create an appropriate incentive for the ILECs to provision special access services in a

¹⁶ BA-NY 271 Order at ¶ 57.

¹⁷ See, e.g., *Service Quality Guidelines* at Metrics OR-1-06, PR-4-01 (note that the metrics contained in the PAP are drawn from the metrics contained in the *Service Quality Guidelines*).

¹⁸ See *PAP March Report*; See also *Service Quality Guidelines*.

¹⁹ See *PAP March Report*.

²⁰ ALTS Petition at 31.

²¹ *Id.*

timely manner. Such an incentive is necessary given the inherent incentive for the ILECs to discriminate in the provisioning of services that facilitate competition.

C. Commission Authority To Adopt Standards

In the *MTS/WATS Market Structure Order*, the Commission found that special access lines are subject to its jurisdiction where it is not possible to separate the traffic carried over them for jurisdictional purposes.²² In reaching this conclusion, the Commission reasoned that special access lines carrying more than *de minimis* amounts of interstate traffic, defined as ten percent or less of the total traffic, are jurisdictionally interstate.²³ Special access facilities are used for providing both ISP and advanced services.²⁴ The Commission has ruled that this traffic is jurisdictionally mixed, but primarily interstate in nature.²⁵ Focal submits, as do many others, that it is not possible, as a practical matter, for a carrier to separate the interstate from the intrastate portions.²⁶ Given that the traffic is jurisdictionally interstate, the Commission has the authority under Sections 201 and 202 to establish provisioning standards for application to special access services.²⁷

²² *GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292 at ¶ 23 (1998) (citing *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd. 5660 (1989) ("*MTS/WATS Market Structure Order*").

²³ *Id.*

²⁴ *See EEL Order* at ¶ 27.

²⁵ *Recip. Comp. Order* at ¶¶ 12, 20.

²⁶ *See id.* at ¶ 19. Focal maintains that traffic terminated to an ISP is local in nature and remains subject to the reciprocal compensation provisions of Section 251(b)(5) of the Act.

²⁷ 47 U.S.C. §§ 201, 202. Focal would note that it still contends that although dial-up calls to ISPs may be jurisdictionally interstate, the dial-up portion of the communication is nonetheless local for purposes of reciprocal compensation under Section 251(b)(5) of the Act.

IV. Conclusion

For the foregoing reasons, Focal urges the Commission to adopt federal provisioning standards and penalties for application to special access services as described herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

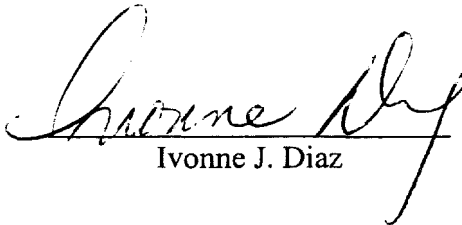
I, Ivonne J. Diaz, hereby certify that on this 23rd day of June 2000, copies of the foregoing Comments of Focal Communications Corporation were delivered by hand to the following:

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